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Supreme Court of the United States

October Term, 1959

No. 598

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

GEORGE GRAVES DIXON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unanimous affirmance and opinion of the Court of Appeals is reported in 268 Fed. 2d 812. Petition for rehearing was unanimously denied (R. 299(a), 300(a)). The opinion of the Trial Judge after the first trial (Weinfeld, J.) is reported in 151 Fed. 2d 106 (R. 168a-170a). The comment of the Trial Judge (Sugarman, J.), after the rendition of the verdict at the second trial which was reviewed by the Court of Appeals is found at R. 127a, 128a.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C. A. Section 1254 (1). However, the petition fails to specify any important and special reasons why in

this case under the facts found by the Trial Judge, Jury, and the Court of Appeals a writ of certiorari should be granted nor does it indicate that any special ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists. The sole contention raised by the petitioner that the Court of Appeals did not follow New York law, even if correct, is rarely accepted as sufficient for the granting of a writ in a case of this kind. In any event, the decision and opinion of the Court of Appeals and the District Court does not, in fact, conflict with New York law, nor is there any conflict existing with any decisions of another Court of Appeals on the same issues.

Counterstatement of the Case

The questions as framed by the petitioner and the evidence related by it to support its position do not contain the important and correct evidence as to whether or not this case is properly the subject for the granting of a writ. It becomes, therefore, necessary to set forth additional facts not embraced in the petitioner's statement.

There were two trials. At the first trial the Jury likewise found that there was a mutual mistake of fact with respect to the release and that the respondent was disabled within the meaning of the policy. This verdict was set aside only upon the ground that the Jury under a misapprehension found the terminal date of disability the sixtieth birthday of the insured instead of to the subsequent date of the trial but all other contentions raised by the petitioner and now raised were denied by the Trial Judge (R. 168a-170a).

After the second trial, which was reviewed by the Court of Appeals, the Trial Court commented that the company's position was highly immoral; that had the advisory Jury

on the issue of release found for the petitioner the Court would not have followed its advice and had it found for the petitioner on the issue of disability it would have set the verdict aside (R. 127a, 128a). Both Trial Judges granted respondent's motion to amend the complaint to claim disability benefits to the date of trial, pursuant to Federal Rule 15(d).

On both trials there was submitted to the Jury for determination the issue whether respondent was disabled from performing the essential duties of both a physician and surgeon and both Juries found him so disabled (R. 125a, 126a, 168a 170a). The testimony was overwhelming that the respondent in his occupations with the Veterans Administration hospitals did not examine, diagnose, prescribe for nor treat patients but was doing administrative work (R. 185a, 186a, 195a, 196a, 201a-204a). The Court of Appeals likewise so found (Appendix, p. 23). It was proven that because of the disease of "contact dermatitis", which caused his hands to flare up when he attempted to sterilize them or keep them clean, he was unable to practice either as a physician or surgeon (R. 176a, 182a, 183a, 206a, 212a). It was stipulated in the pretrial Order that sterility of the hands is essential in surgery and cleanliness of the hands essential in the practice of medicine (R. 163a). At the commencement of his disability Dr. Dixon was practicing exclusively as a surgeon (174a, 175a).

The testimony was that medical treatment for this condition would serve no beneficial purpose and was not necessary (R. 193a, 197a, 214a, 215a, 217a, 219a). In fact, petitioner's medical expert conceded that the best therapy for Dr. Dixon was to cease practicing (R. 229a, 235a, 236a). The Court of Appeals found that respondent "consulted two specialists in dermatology and followed their prescribed course of treatment. Over a period of three years the dis-

case persisted, quieting down when surgery and necessary preparations therefor were avoided and flaring up when they were practiced" (Appendix, p. 28).

With respect to the release, although the petitioner knew that Dr. Dixon was disabled and would continue to be disabled, having received the medical reports to that effect from its experts (R. 259a, 262a, 238a, 239a), it nevertheless suggested the settlement (R. 247a).

When the release was executed the respondent had already accepted a job with the Veterans Administration (R. 94a, 96a, 97a, 254a). Petitioner's Claims Manager told Dr. Dixon that when he commenced working with the Veterans Administration, which appointment Dr. Dixon had obtained and had accepted, he would not receive any further disability benefits (R. 87a, 90a, 94a, 95a, 96a, 99a, 249a, 251a). Dr. Dixon did not know that he would still be entitled to disability benefits (R. 251a, 252a) and "in agreeing to the settlement, in signing the release" he relied upon these representations of the Claims Manager (R. 94a, 249a, 251a). The petitioner's Claims Manager testified that his knowledge that Dr. Dixon had received this job with the Veterans Administration was one of the basis for suggesting a settlement (R. 246a, 247a, 83a, 84a). The amount of $1411.32 paid was the approximate amount due Dr. Dixon to the date of the release.

He was not represented by counsel (R. 248a). The respondent's attorney who later represented him in this matter wrote a letter to the petitioner requesting claim forms for submission of proof of continuing disability from the same disease clearly inferring that Dr. Dixon was not recognizing the validity of the release (R. 263a, 264a).

Argument

(1) This Court has declared its policy of rarely granting a petition in a case of this kind where the purpose is to have this Court review findings of facts and the decision of the Court of Appeals on applicable local law.

Hinckle v. *New England Mutual Life Insurance Company*, 358 U. S. 65;
Dick v. *New York Life Insurance Company*, 359 U. S. 437;
General Box Company v. *U. S.*, 351 U. S. 159;
Ragan v. *Merchants Transfer Company*, 337 U. S. 530;
Graver Mfg. Co. v. *Linde Co.*, 336 U. S. 271.

(2) In any event, as will be hereinafter shown, on each of the issues determined there was no conflict between the decision and opinion of the Court of Appeals and New York law nor is there any conflict existing on any of the issues between the Court of Appeals of the Second Circuit and any other Circuit and the findings of fact were based upon substantial evidence.

(3) As heretofore pointed out, the issue as to whether the respondent was disabled both as a physician and surgeon was, in fact, submitted to the Jury which determined that Dr. Dixon was disabled in both capacities. There was, therefore, no conflict with the decision of the New York Court of Appeals in *Metcalf* v. *Equitable Life Assurance Society*, 292 N. Y. 419. We argued, in addition, in the Court of Appeals, although not necessary to sustain the verdict that he was disabled both as a physician and surgeon, that under the policy in suit the insured had a right to change his occupation (R. 250a) and hence he was only required to prove that he was disabled as a surgeon, which was his uncontroverted occupation (R. 174a, 175a). A

determination of this question by the Court of Appeals was not necessary for the affirmance of the Jury's verdict that he was disabled both as a physician and surgeon.

(4) The testimony was overwhelming and in fact admitted that medical treatment would have no likely beneficial result and the best therapy for Dr. Dixon was to cease practicing. Under such circumstances he was not required to prove medical treatment. The latest New York cases are in full accord (*Ottey* v. *National Casualty Company*, 192 Misc. 902, 81 N. Y. S. 2d 534; *Goldbard* v. *Empire Mutual Insurance Company*, 156 N. Y. S. 2d 324; mod. 164 N. Y. S. 2d 294, mod. 5 A. D. 2d 230; *Hunter* v. *Federal Casualty Company*, 199 App. Div. 223; *Harasymczuk* v. *Massachusetts Accident Co.*, 127 Misc. 344).

Judge Weinfeld after the first trial rejected the contentions of the petitioner and adopted the cited cases as representing New York law (151 Fed. 2d 106; R. 168-170). Judge Sugarman at the second trial unqualifiedly adopted his opinion (R. 255a). The Court of Appeals agreed (Appendix, p. 28).

(5) With respect to the release, the petitioner affirmatively pleaded both release and accord and satisfaction (R. 9a-10a) and in the pretrial Order stipulated "that the trial of this action shall be based upon the pleadings as amended" (R. 162a) and that the issue to be tried amongst others was "(1) the validity of the release" (R. 167a). At the trial the petitioner pressed its contention which was accepted that it has "the burden of establishing that this claim was released and that there was an accord and satisfaction" (R. 191a). No motion by the petitioner with respect to the pleadings was made at any time. In any event "failure to so amend does not affect the result of the trial of these issues" (Federal Rule 15(b)—also Fed-

eral Rule 61). There was no need of tender of the amount received prior to suit (Section 1126 of the New York Civil Practice Act), *Ciletti* v. *Union Pacific Railway Company* (196 Fed. 2d 50, Sec. Cir., 1952).

Under New York Procedural law "cases where defendant has not taken advantage of the Frehe rule by moving with respect to the sufficiency of the complaint are not applicable" (*Frankenheim* v. *B. Altman & Co.*, 1 App. Div. 2d 200). No motion attacking the complaint was made and in any event the amount paid in settlement was deducted from the demand for judgment in the amended complaint and in the verdict (R. 161a, 152a).

Furthermore, under New York law where the answer pleads release the issue whether it was fairly and knowingly made is triable (*Finke* v. *Iris Cab Corp.*, 1 App. Div. 2d 692, a. dis. 1 N. Y. 2d 851, a. den., 2 App. Div. 2d 780, a. dis. 2 N. Y. 2d 722).

(6) When the petitioner's Claims Manager represented to Dr. Dixon that it would not pay him disability benefits when he commenced working for the Veterans Administration in an administrative capacity, the respondent had already received his appointment and had taken the job and so informed the company (R. 94a, 96a, 97a). Dr. Dixon "in agreeing to the settlement, in signing the release" relied upon the representations of the Claims Manager (R. 94a, 249a, 251a).

The facts in the cases cited by the petitioner differ from the facts herein proven. The exhaustive opinion of the Court of Appeals and the authorities cited on the applicable law are in full accord not only with general law but with New York law. *Hudson* v. *Glens Falls Insurance Company*, 218 N. Y. 133, cited by the Court of Appeals (Appendix, p. 25) is directly in point on the factual situa

tion herein proven. See also: *Ginsburg* v. *Equitable Life Assurance Society*, 254 App. Div. 445.

In the Court of Appeals the petitioner never contended that the Court's charge did not correctly state the New York law on both the issues of release and disability nor was the charge challenged in any respect. The Court of Appeals observed that the Court's charge was most comprehensive and fair (Appendix, pp. 24, 27).

(7) Upon the first trial a motion was similarly made and granted permitting the amendment of the complaint to the date of trial. The amendment at the second trial was allowed under the pretrial Order, pursuant to Rule 15 (d) of the Federal Rules, to avoid a multiplicity of suits as fully explained by the Trial Court (R. 162a, 171a, 172a). There was no amendment nor was any sought for the recovery of disability benefits beyond the date of trial. The evidence adduced by both sides at the trial was limited solely to the period of disability up to the date of trial and the Jury so found and were instructed to limit the recovery to this period (R. 121a, 126a). The Court of Appeals held "the supplemental complaint merely sought damages up to the date of trial; not in the future. The amendment allowed by pretrial Order pursuant to Federal Rule of Civil Procedure 15 (d) was proper" (Appendix, p. 29).

The cases cited by the petitioner, including *Morgan* v. *Aetna Life Insurance Company*, 157 Fed. 2d 527, dealt with cases where the insured sought for or obtained a decree entitling him to benefits beyond the date of the trial and have no analogy to the case at bar.

Conclusion

(1) The decision of the Court of Appeals is correct.

(2) The petition fails to present any important or special reasons for granting the writ.

(3) There is no conflict between the decisions of the Courts below and the New York Courts nor between the Court of Appeals of this circuit with another circuit on any of the issues.

(4) The findings of fact were based upon substantial evidence.

(5) In any event, petitioner's contentions, assuming they are correct, are insufficient for the granting of the writ.

(6) The application is without merit.

(7) It is therefore respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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